

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

RONALD L. FOX)	
Claimant)	
VS.)	
)	Docket No. 128,246
ALLSTATE ROOFING, INC.)	
Respondent)	
AND)	
)	
THE HARTFORD)	
Insurance Carrier)	

ORDER

The respondent and its insurance carrier requested review of the Award dated May 22, 1995, entered by Administrative Law Judge Robert H. Foerschler.

APPEARANCES

Claimant appeared by his attorney, Dennis L. Horner of Kansas City, Kansas. Respondent and its insurance carrier appeared by their attorney, Timothy G. Lutz of Overland Park, Kansas. There were no other appearances.

RECORD AND STIPULATIONS

The record considered by the Appeals Board and the parties' stipulations are listed in the Award.

ISSUES

The Administrative Law Judge awarded claimant permanent partial general disability benefits for a 31 percent whole body functional impairment. The respondent and its insurance carrier requested review of that award. The issues before the Appeals Board on this review are:

- (1) Whether the relationship of employer and employee existed on the date of accident.
- (2) The average weekly wage.
- (3) Nature and extent of disability.
- (4) Whether the medical expense incurred by claimant was necessary.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record, the Appeals Board finds as follows:

The Award entered by the Administrative Law Judge should be affirmed.

(1) Claimant worked for the respondent as a roofer with some supervisory duties. The Appeals Board agrees with the conclusion of the Administrative Law Judge that the relationship of employer and employee existed on the date of claimant's accident, January 22, 1988. The detailed findings made by the Administrative Law Judge are replete and demonstrate that respondent retained and exercised the authority to control, terminate, closely supervise, and direct claimant's activities. In fact, on the date of accident, respondent directed claimant to work on the icy roof from which he fell to make specific repairs despite claimant's reluctance. Further, respondent provided all the materials for the project and some of the equipment required.

The primary test used in determining whether a worker is an independent contractor or an employee is whether the employer has the right to control or direct the manner in which the work is to be accomplished. Wallis v. Secretary of Kans. Dept. of Human Resources, 236 Kan. 97, 689 P. 2d 787 (1984). However, the right to control is not the only factor to be considered as the right to terminate the worker, manner and method of payment, and the furnishing of tools or equipment are also significant factors.

Based upon the entire record, claimant has proven that he was working for the respondent as an employee on the date of accident.

(2) The Administrative Law Judge found that claimant's average weekly wage was \$700. Based upon the evidence presented on that issue, the Appeals Board finds \$700 to be reasonable and adopts that finding as its own. At the regular hearing, claimant

testified that while working for the respondent he earned between \$600 and \$750 per week depending upon the weather. The \$700 average weekly wage is also within the range of \$15-\$22 per hour that respondent's vocational expert, Michael J. Dreiling, testified a good roofer could earn. We are not presented with persuasive reason to disturb the Administrative Law Judge's finding of average weekly wage.

(3) The Appeals Board agrees with the Administrative Law Judge that claimant should receive permanent partial disability benefits based upon the stipulated 31 percent whole body functional impairment rating. Although it is true claimant sustained severe injuries as a result of the January 1988 accident, it is also true that claimant retains the ability to perform most, if not all, of his former duties as a roofer. That conclusion is based upon the testimony of Michael J. Poppa, D.O., who is board certified in occupational medicine. Dr. Poppa testified that claimant retains the ability to work as a roofer. Dr. Poppa's opinion is corroborated by videotapes and still photographs taken in November 1990 that show claimant working on a roof and lifting, bending, stretching, reaching, and working at odd angles. Because it does not appear that claimant's expert, Nathan Shechter, M.D., had the opportunity to view those videotapes and photographs or knew of their contents, the Appeals Board finds that Dr. Shechter's opinions of claimant's physical abilities are not as persuasive as Dr. Poppa's.

Because his is an unscheduled injury, claimant's entitlement to permanent partial disability benefits is governed by K.S.A. 1987 Supp. 44-510e which provides in part:

"The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the ability of the employee to perform work in the open labor market and to earn comparable wages has been reduced, taking into consideration the employee's education, training, experience and capacity for rehabilitation, except that in any event the extent of permanent partial general disability shall not be less than [the] percentage of functional impairment. . . . There shall be a presumption that the employee has no work disability if the employee engages in any work for wages comparable to the average gross weekly wage that the employee was earning at the time of the injury."

Considering the entire record, the Appeals Board finds that claimant has failed to prove he has sustained a work disability greater than the stipulated 31 percent whole body functional impairment rating. Claimant retains the ability to roof houses, and, therefore, retains the ability to earn the same wages that he earned before the accident. Further, assuming that claimant is unable to perform the very heavy and some heavy labor which Dr. Poppa believed before he saw the videotapes and photographs, those restrictions would only eliminate 5 to 10 percent of the open labor market. When considering both loss of ability to perform work in the open labor market and loss of ability to earn a comparable wage, claimant's work disability is less than the stipulated functional impairment rating.

Therefore, claimant's permanent partial disability benefits are to be computed based upon the 31 percent functional impairment rating.

(4) By stipulation filed March 10, 1995, the parties entered into evidence 102 pages of medical bills and summary. The parties stipulated that the charges represented in those bills were reasonable and customary. However, the issue remaining before the Administrative Law Judge was whether the medical expense was necessary.

Claimant testified he was hospitalized for several months following the January 1988 accident. He also testified that he was treated at St. Joseph's in 1989 or 1990 as a result of a second fall from a roof in that time frame. Because the evidence fails to prove it is more probably true than not true that the second fall was related to the January 1988 accident or its resulting injuries, the medical bills incurred as a result of the second fall are not the responsibility of the respondent and its insurance carrier in this proceeding. Claimant's testimony that this second fall was caused by equilibrium problems which began after January 1988 is not persuasive to establish causation between the events. No physician or other health care provider or expert related the second fall to the January 1988 accident.

To the extent respondent contends that the medical treatment rendered claimant, other than that related to the second fall in 1989 or 1990, was either unnecessary or was excessive, the respondent should utilize the peer review provisions contained in K.S.A. 44-510, as amended, to address those issues.

(5) The Appeals Board hereby adopts the findings and conclusions of the Administrative Law Judge as contained in the Award to the extent they are not inconsistent with the above.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award dated May 22, 1995, entered by Administrative Law Judge Robert H. Foerschler should be, and hereby is, affirmed.

IT IS SO ORDERED.

Dated this ____ day of November 1996.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Dennis L. Horner, Kansas City, KS
Timothy G. Lutz, Overland Park, KS
Robert H. Foerschler, Administrative Law Judge
Philip S. Harness, Director